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Introduction

Gender biases and discrimination have created conditions where women were and in some instances are still considered the lesser of the two sexes. The issue of gender inequality is global. World news reports relates stories of women who are not given the same privileges as men.[1] Certain cultures have assigned roles to women and they risk punishment or ostracism if they dare to step outside of the bounds that were created for them.[2] Here, in the United States, women have come a long way with the right to vote and the opportunity to get an education alongside men. However, women still face instances of gender inequality regarding the issues of equal pay and equal treatment.[3] However, there is one area in which women have the upper hand. That area is reproductive freedom through abortion. In *Roe v. Wade*[4], the Supreme Court of the United States ruled in favor of a woman's right to choose to obtain an abortion prior to viability of the fetus.[5] The Court gave deference to the effects of pregnancy on a woman and ignored the effects of abortion on men.

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[1] FEMINIST.COM, http://www.feminist.com/news/?gclid=CKf12vncmLQCFep9Ogodd2cA2Q (last visited Dec. 12, 2012).
[2] Michael Shmulovich, *15-year-old Bedouin Girl Stabbed To Death in Suspected Honor Killing* (Nov. 26, 2012, 10:11 PM), http://www.timesofisrael.com/15-year-old-bedouin-girl-stabbed-to-death-in-suspected-honor-killing/.
[3] Debra Ness, *When Women do Better, Families Do Better and the Nation Can Thrive* (Apr. 12, 2012), http://blog.nationalpartnership.org/index.php/2011/04/. Women in the United States earn 77 cents for every dollar earned by men.
[4] 410 U.S. 113 (1973).
[5] *Id.* at 164-65.

This paper argues that completely ignoring the ways in which abortion affects men constitutes gender discrimination. This paper will propose a compromise that will not take away a woman's right to choose while alleviating the gender discrimination that men face when it comes to abortion and their reproductive rights. Part I will discuss the history of abortion prior to *Roe v. Wade* and how gender inequalities played a role in the criminalization of abortion. Part II will discuss the changes that led to the legalization of abortion in *Roe v. Wade*. Part III will analyze *Roe v. Wade* and some of the criticisms of the Supreme Court's decision. Part IV will focus on the Court's view of men's right to or to not reproduce. This part will discuss the gender norms that are assigned to men in the United States and how these norms play a role on the decisions of the courts. Also, this part will consider arguments made by men regarding their right to not reproduce. Part V will propose that the law should furnish a more equitable solution for men and women in regards to abortion.

Part I – The Effects of Gender on Abortion Prior to *Roe v. Wade*.

Ancient accounts of abortion reveal that the practice has not always been illegal. For instance, In Ancient Rome, abortions were performed with very limited restrictions.[6] Aristotle supported abortions that were performed during the early stages of pregnancy prior to the "animated" stage of the fetus.[7] He believed that the fetus did not acquire a soul until the point in its gestation where it would show sign of life by moving.[8] However, only the mother could determine whether the animation or "quickening"[9] of the

[6] KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 12 (1994).
[7] LAWRENCE LADER, ABORTION 77 (1966).
[8] *Id.*
[9] LUKER, *supra* note 6, at 2. St. Thomas Aquinas introduced to notion of "quickening" which refers to the first movement of the fetus in the mother's womb.

fetus occurred. This dilemma gave leave to abortions that would be performed after the "quickening" of the fetus.[10]

In the United States, abortion was not always illegal. During the early nineteenth century, abortions were commonly performed with the use of pills, drugs and chemical agents.[11] However, these methods of abortion were not always effective.[12] Nevertheless, those who provided abortion services openly advertised their practice and women in need of abortions sought their help.[13] In 1821, Connecticut became the first state to enact a restrictive abortion law that prohibited all abortions except for those that were performed to preserve the life of the mother.[14] Other states followed in the footsteps of Connecticut and enacted their own restrictive abortion laws.[15] These laws contained severe criminal sanctions for women who sought abortions for reasons other then to preserve their lives.[16] The laws also condemned the distribution of abortifacients, contraceptives, information and advertisements regarding abortion.[17]

In the mid nineteenth century, America experienced a boost in the anti-abortion movement. Doctors almost exclusively led the anti-abortion movement and placed great pressure on fellow physicians, legislators and clergymen make abortion a political issue.[18] The doctors' crusade hinged on a scientific understanding that conception was the

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[10] *Id.* at 13.
[11] Richard W. Bourne, *Abortion in 1938 and Today: Plus Ça Change, Plus C'est la Même Chose*, 12 S. CAL. REV. L. & WOMEN'S STUD. 225, 251 (2003).
[12] *Id.*
[13] *Id.* at 251-52.
[14] Bourne, *supra* note 11, at 252. Abele v. Markle, 342 F. Supp. 800, 804 (D. Conn. 1972) invalidated CONN. GEN. STAT. §§ 53-29 (1860) on the grounds that the Connecticut's anti-abortion statutes intrude in areas in which the state has little interest.
[15] MASS. GEN. LAWS ANN. ch 272, § 19 (West 1970); N.J. STAT. ANN. § 2A:87-1 (West 1969).
[16] Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 282 (1992).
[17] *Id.*
[18] *Id.*

beginning of human development.[19] As a result, the "quickening" of the fetus would have no bearing on whether a woman could obtain an abortion. Once conception occurs the woman would have to carry the pregnancy to term unless she suffers severe health risks from the pregnancy that would gravely impact her health. Doctors were able to formulate the issue of abortion on moral ground based on the notion that human development started at conception.[20] Basically, terminating a pregnancy at any stage in the development of the fetus is a destruction of human life.[21]

However, moral values and scientific understanding of human development were not the only reasons that motivated the doctors to pioneer the anti-abortion movement. Midwives dominated the field of abortion while doctors performed other medical procedures.[22] Doctors wanted to establish the medical field as a profession and in order to do so they needed to confine all medical practice to their authority.[23] Such endeavor entailed removing the practice of abortion out of the hands of midwives.[24] In order to do so, they needed to disqualify the midwives ability to perform abortions and their argument that life starts at conception was the perfect means to that end. This clever stratagem was led by men and failed to take into consideration the consequences that anti-abortion laws would have on women. Essentially, the efforts of the doctors were not motivated solely or primarily by the desire to protect the sanctity of life but rather to unify the medical field.

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[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.* at 283. According to Siegel, the doctors taught the midwives to perform abortions but refrain from engaging in the practice. The consensus was that women were better apt to deal with matters that concerned women. When the doctors attempted to perform abortions, they generated derision from the midwives. Consequently, pride and jealousy led the doctors to plan to strengthen the medical profession and to do so by gaining exclusivity over all medical procedures.
[23] *Id.*
[24] *Id.*

Doctors successfully argued for the ban on abortion by dispelling the notion that life begins at quickening and revealing that life began as soon as the ovum is impregnated.[25] By doing so, they shook the ground on which the common law rested to rule that abortions that are performed prior to the quickening of the fetus were legal. Furthermore, they presented the fertilized egg as a baby with an identity separate from the mother.[26] In doing so, the doctors appealed to the sensitivities of women.[27] As a result, a new view of maternal and fetal relations immerged. The fetus was no longer just a part of the woman but rather a separate entity with personal rights.[28]

Another point that the doctors were able to advance in order criminalize abortion is that abortion, along with contraception, undermine the institution of marriage.[29] Doctors contended that marriage is designed to promote the survival of the human race through procreation.[30] Choosing to not procreate either through contraception or abortion amounted to sin.[31] Doctors relied on religion and made allegations that marital sexuality has therapeutic benefits.[32] The reason for that is that sex within the confines of marriage diminishes the spread of sexually transmitted diseases. Finally, the doctors made abortion an issue for the state's interest. The doctors stressed that sex produces citizens and that the state should aim to protect the lives and wellbeing of its citizens.[33] Men made these arguments while women were not given much of a say.[34] Certainly there where women

[25] *Id.* at 287.
[26] *Id.* at 289.
[27] *Id.*
[28] *Id.* at 290.
[29] *Id.* at 293.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.* at 297-98.
[34] *Id.*

who embraced the anti-abortion movement.[35] The doctors stressed that women who sought abortions were ignorant as to the reproductive process.[36]The doctors adopted paternalistic roles over women. The doctors attributed the need for abortion by women to egoism.[37] The woman's sole purpose in life was believed to bear children. Therefore, a woman who obtained an abortion could only do so for selfish reasons.

While doctors were pushing to criminalize abortion in the mid nineteenth century feminists did little to advocate abortion rights for women. They had their hands full with issues of gender inequality that disadvantaged women in other areas and could not pay much attention to the issue of abortion. Their focus was on a woman's right of voluntary motherhood.[38] They advocated for a woman's right to refuse sexual advances from her husband.[39] Wives were considered to be objects of the sexual needs of theirs husbands and feminists wanted to eradicate this norm that prevailed in marriage.[40] The doctors fired back that the notion of voluntary motherhood conflicted with the duty to procreate.[41] The already diminished freedom that women had over theirs bodies made it even easier for the doctors to take away the right to a pre-quickening abortion. The doctors were also able to attack the feminists' arguments for voluntary motherhood by saying that motherhood was not a matter of personal choice for women but rather their destiny.[42] The feminists had their hands full with the fight for a wife to have personal rights over her body and could not direct their efforts towards fighting the anti-abortion movement. Some even accepted the doctors view that abortion was immoral while others were not

[35] *Id.*
[36] *Id.* at 302.
[37] *Id.*
[38] *Id.* at 305.
[39] *Id.*
[40] *Id.*
[41] *Id.* at 308.
[42] *Id.* at 311.

satisfied that the act be labeled as simply evil without any consideration for the social conditions of motherhood that would make abortion a better option for women.[43] Ultimately, the doctors where successful and laws banning abortion or restricting it and laws banning contraception were enacted throughout various jurisdictions.

Part II – The road leading up to *Roe v. Wade*

Abortion in the United States became illegal in many states and was acceptable in only limited circumstances such as the preservation of the mother's life. The use of contraception was also illegal. Nevertheless, abortions were not scarce. Abortions were performed clandestinely and resulted in the death of many women.[44] Despite the death of these women, the laws against abortion were not revisited to account for the lost of lives. On the other hand, juries more often than not refrained from convicting those who practice abortions.[45] In *Aetna Casualty & Surety Co. v. Yeatts*[46] the 4th Circuit court affirmed the decision of the District Court for the District of Virginia declining to render a judgment not withstanding the verdict and ordering a new trial.[47] This case reflects that the public was not willing to hold people who perform abortions accountable for their violations of the law. There is a sense that it was understood that abortions that were performed by people who were not qualified to do so posed a great risk to the woman. But on the other hand, convicting those who perform abortions would present another risk for women who would not be able to use the service. All in all, the jury's verdict shows that the American public was not ready to part ways with abortion completely.

[43] *Id.*
[44] Bourne, *supra* note 11, at 1.
[45] *Id.*
[46] 122 F.2d 350 (4th Cir. 1941).
[47] *Id.* at 355.

In addition, the case of Yeatts illustrates undertone of gender war that shaped abortion laws. Men ran the show in the courtroom although the life of a woman was lost during as a result of a procedure that is unique to women. In that case, Yeatts sought reimbursement from Aetna, his insurance company, for a procedure that he performed on Elizabeth Burton. The insurance declined to reimbursement the money on the grounds that Elizabeth Burton lost her life as a result of an illegal abortion that Yeatts performed.[48] In the face of the evidence, the jury returned a verdict against Aetna.[49] The circuit court ruled that the jury's verdict was not against the clear weight of the evidence and that the lower court did not abuse its discretion by not granting Aetna's motion for a judgment not withstanding the verdict and a new trial. This case is criticized for relying mostly on the testimony of expert witnesses who were male and the failure of the prosecution to capitalize on the testimony of Elizabeth Burton's sister who accompanied her to the appointment with Yeatts.[50] Ultimately, men carried the day and were the main players in the trial for the death of a woman caused by an incomplete and negligent abortion. This is not surprising given that the doctors were able to stifle the voices of women during their anti-abortion campaign. Perhaps the outcome of the case would have

[48] *Id.*

[49] Bourne, *supra* note 11, at 230-42. Richard W. Bourne conducted extensive research regarding this case and interviewed Yeatts' grandson, Bill Anderson, who revealed that around the age of ten he discovered dead fetuses in his grandfather's garage. Furthermore, Elizabeth Burton's family physician was aware that she was pregnant and wanted to terminate the pregnancy for fear that it will be evidence of her premarital sexual activity. The family physician in turn referred her to Yeatts who is a "certified doctor", meaning that had a license to practice medicine without having a medical degree. The evidence that the family doctor referred Mrs. Burton to Yeatts was deemed inadmissible and was not presented to the jury. According to Bourne, it was common for a "certified doctor" to perform abortions while doctors who obtained a medical degree fawned on the practice. However, these legitimate doctors would provide abortion services to women who could afford them and they would mask the procedure as something else in order to not face legal charges. Bourne related that the evidence in court weight toward the fact that Yeatts did in fact perform a botch abortion on Elizabeth Burton. Furthermore, Yeatts testimony was very inconsistent and factually flawed. Nevertheless, the jury found that he did not perform an abortion and that Aetna must reimburse to him the money that he paid to the family of Elizabeth Burton for her death.

[50] *Id.* at 248-49.

been different if Mrs. Burton's sister was the principal witness for the prosecution. Perhaps the jury would have been more sympathetic to the risks that women face by turning to "certified doctors" for their abortion needs. Nevertheless, Yeatts did not discontinue his practice of performing abortions until 1951.[51]

The history of abortion in the United States and *Yeatts* reveal that gender tensions were at the core of the issue abortion. In order to gain control of the legal profession, doctors had to disqualify midwives who performed abortions. They did so by telling women what their duties were. Nevertheless, the control that men had over women's reproductive freedom did not last. The repealing of anti-abortion law did not happen suddenly. The Supreme Court of the United States invalidated restrictive procreation laws that paved the path to legalizing abortion. The right to an abortion evolved from the right to privacy that the Supreme Court started to recognize in matter of child bearing and reproduction.

In *Griswold v. Connecticut*[52], the Supreme Court declared that the states could no longer prohibit the prescription, sale, or use of contraceptives, even for married couples. The Court held that childbearing falls under the constitutional "right to privacy". The Connecticut statute imposed fines and jail time for anyone who used "any drug, medical article or instrument for the purpose of preventing conception"[53] and for anyone who assisted, abated, counseled, caused, hired or commanded another to use contraceptives could be prosecuted as if that person was the principal offender.[54] The Court stressed that

[51] *Id.* at 235.
[52] 381 U.S. 479 (1965).
[53] *Id.* at 480.
[54] *Id.*

case involved a matter that is protected by several constitutional guarantees.[55] The Court maintained that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the are of protected freedom".[56] The Court placed the right of privacy as one of the most sacred rights that preceded the Bill of Rights.[57] The Supreme Court declined to interfere with the reproductive choices of married couples and solidified the boundaries of the right to privacy in a marriage. This case was presented the perfect scenario to invalidate anti-contraception laws. In the fight for reproductive freedom, the doctors who were men were winning. They were able to get the legislators and clergymen on their side. However, these laws also placed a burden on men because they eventually affected their reproductive rights. This was the case with the Connecticut law. It forbade married couples to use contraceptive and as a result, married man who did not wish to become fathers faced possible imprisonment if they used contraceptive. It is very possible that the law was overturned because it constituted a burden on men also. If the issue affected women only, those who lobbied for the enactment of these laws could have maintained their arguments that women did not want to procreate out of pure selfishness.

There was also a shift of interest by doctors. In the beginning of the anti abortion movement, doctors were the pioneers. Later, doctors became one of the principal people who were breaking the restrictive laws.[58] It is not surprising that the doctors would take that position since their primary purpose in pushing for the anti-abortion and anti-

[55] *Id.* at 485.
[56] *Id.*
[57] *Id.* at 486.
[58] *See generally Id.* The appellants in *Griswold* were the Executive Director of Planned Parenthood League of Connecticut and licensed physician and professor at Yale Medical School.

contraception movement was not to promote the sanctity of life. Their agenda was to take away from midwives an area of medicine that was out of their reach.

The Supreme Court continued to expend the right to privacy in regards to reproductive freedom. In *Eisenstdt v. Baid*,[59] the Court also established the right of unmarried individuals to obtain contraceptives. Baid was convicted for giving away vaginal foam for contraceptive purposes to a young unmarried woman.[60] The Massachusetts law only allowed the distribution of contraceptives to married couples and such distribution could only be made by a registered physician or registered pharmacist.[61] The Court did not find that the statute had a clear legislative purpose.[62] The Court held that the statute is a per se prohibition on contraception for single persons and is therefore a violation of the Equal Protection Clause of the Fourteenth Amendment.[63] The Court reiterated that the Equal Protection Clause did not deny to the states the power to legislate that people receive different treatments and be placed in different classes in order to serve the purpose of the legislation.[64] However, the classification must be reasonable and must be fair and substantially related to the object of the statute.[65] The Court was not persuaded that promoting purity and chastity was a valid purpose of the statute. The Court mentioned that its decision in Griswold dealt with the right of privacy that married couple shared.[66] However the right to privacy is an individual rights whether the person is married or single.[67] Accordingly, the person must be free of unwarranted governmental

[59] 405 US 438 (1972).
[60] *Id.* at 440.
[61] *Id.* at 441.
[62] *Id.* at 442.
[63] *Id.* at 443.
[64] *Id.* at 447.
[65] *Id.*
[66] *Id.* at 454.
[67] *Id.*

intrusion in matters that concern the right of that person to bear or beget a child.[68] The case can be seen as one of the most important cases on the road to recognize a woman's right to reproductive freedom, including the right to terminate a pregnancy. By severing the married couple as two individuals with personal privacy rights, the Court is allowing women to be recognized and to stand-alone. In a sense, the Court achieved what the feminist aimed at achieving, which was to free wives of the sexual dependence on their husbands. It would therefore follow logically that a single woman would also have the right to privacy when it comes to her reproductive choices.

With the issues of privacy for married couples and single individuals settled, the Supreme Court was ready to decide cases on the issue of abortion. In *State v. Vuitch*,[69] the Court declined to invalidate a law that allowed abortion only in limited circumstances by reading the statute broadly to include the mental health of the mother.[70] Vuitch, a doctor claimed that a District of Columbia law permitting abortion only to preserve a woman's life or health was unconstitutionally vague.[71] The Court rejected the claim and concluded that "health" includes considerations of psychological as well as physical wellbeing. [72] The Court advised that the statute should be read to authorize abortions whether or not the mother had a history of mental health that preceded the pregnancy.[73] The Supreme Court relied on the definition of the word health as in the Webster's Dictionary as a being of sound in body and in mind to support its holding that the meaning of the word "health" in the statute was so imprecise that it violated the Due

[68] *Id.*
[69] 402 U.S. 62 (1971).
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.* at 71.

Process Clause.[74] Although the Court refrained from invalidating the statute, its broader reading of it could be seen as a step toward expending the reasons why a woman may obtain an abortion. The fact that women could obtain an abortion regardless of when her mental health became an issue is interesting. The Court in a sense recognized one of the arguments that the mid nineteenth century feminists made regarding the fact that there are reasons other than the preservation of the mother's life that warrants an abortion.

Part III – *Roe v. Wade*

Roe v. Wade reached the Supreme Court at a time where society was ready to see a change in the abortion laws. The groundwork was already done with the recognition that the right to privacy was an individual right that was share by married couples and single persons alike[75]. Also, the right to privacy was so fundamental that the government could not infringe on it without a legitimate reason[76]. In *Roe v. Wade*, the Supreme Court invalidated a Texas law that prohibited all but lifesaving abortion[77]. The Court ruled that a woman has a fundamental right to privacy regarding whether to terminate her pregnancy[78]. In order to invalidate the law, the Court looked at the history of abortion and saw that the practice was rather common in ancient times[79]. The Court acknowledged that the prosecution of abortion in some places was based on the father's right to his offspring.[80] The Court found that although the Hippocratic Oath did not endorse abortions, at common law, abortions that were performed prior to the first movement of

[74] *Id.* at 71-72.
[75] *See, e.g., Vuitch*, 402 U.S. 62 (1971).
[76] *Id.*
[77] Roe v. Wade, 410 U.S. 113 (1973).
[78] *Id.* at 130.
[79] *Id.*
[80] *Id.*

the fetus were not considered indictable offences.[81] In addition, the Court also found that "at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect."[82] The Court pinpointed that the reasons that were given to compel the criminal abortions laws are, to discourage illicit sexual conduct, concerns with the medical hazards that performing an abortion posed on women, and the state's interest in protecting prenatal life.[83] The Court mentioned that with regards to deterring illicit sexual activities, the state did not have a proper purpose and with regards to the medical risk, the Court pointed that modern technology has reduced those risk.[84] The Court turned to the Constitution and found that it does not explicitly mention any right to privacy.[85] However, the Court reasoned that whether the right to privacy is found in the Fourteenth Amendment's concept of person liberty or the Ninth Amendment's reservation of rights to the people, it is broad enough to include a woman's decision to terminate her pregnancy.[86] With that decision, the right of privacy was not only reserved for the use of contraceptives. A woman would now have the choice to prevent a pregnancy and to terminate an unwanted pregnancy.

The Court also took into account the effects of pregnancy on women. As it stated, "maternity, or additional offspring, may force upon the woman a distressful life and future."[87] Furthermore, "there is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable,

[81] *Id.* at 131-32.
[82] *Id.* at 140.
[83] *Id.* at 148-50.
[84] *Id.*
[85] *Id.* at 152.
[86] *Id.* at 153.
[87] *Id.*

psychologically and otherwise, to care for it."[88] Nevertheless, the Court did not agree that the woman is to have an absolute right and "is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses."[89] The Court recognized that the right to privacy is not absolute and that it "must be considered against important state interests in regulation."[90] The Court recapitulated that where certain "fundamental right" are involved, a "compelling state interest" is needed enact regulation that limit those rights and the enactments must be narrowly tailored to achieve that goal.[91] Ultimately, the Court found that the Texas statute violated the Due Process Clause of the Fourteenth Amendment and gave a guideline of when abortions can be performed.[92] The Court's mandate is that during the first trimester of pregnancy, the decision to obtain a pregnancy must be left to the medical judgment of the pregnant woman's attending physician; during the second trimester, the state has an interest in the health of the mother an can regulate the procedure of an abortion in a way that promotes that interest; and lastly, during the last trimester of the pregnancy, the state has an interest in preserving the potential life of the fetus and it can regulate or proscribe abortion except when it is necessary to preserve the life and health of the mother.[93]

The Supreme Court's decision in *Roe v. Wade* legalized abortion throughout the United States and constituted a great victory for women. The health of the mother no longer needed to be at risk in order to get an abortion. The Court also gave more weight to arguments in favor of women because of the biological nature of pregnancy. In the

[88] *Id.*
[89] *Id.*
[90] *Id.* at 154.
[91] *Id.* at 155.
[92] *Id.* at 164.
[93] *Id.* at 164-65.

past, the doctors led the campaign against abortion. Their arguments where given more weight and that the feminists were dismissed. The doctors talked about what pregnancy was like and said that it was the destiny of women to become mothers. They contended that a woman who wanted to obtain a pregnancy would do so only for egoistic reasons. In *Roe v. Wade*, the Court looked at the history of abortion and the reasons for the anti-abortion laws in the United States. The Court then analyzed how abortion affected women not just on a physical and metal capacity but also on an economic capacity. The court recognized that carrying a pregnancy to term can have negative consequences on a woman's financial situation that could even impact in a negative way the lives of her other children. The opinions or men and the points of view of men where excluded from the decision. The only views that mattered are those of women and the state in preserving the life of the mother and the potential life of the fetus. Nevertheless, that decision still continues to be highly contested and is met with a lot of criticism.

Some scholars are skeptical of how much a victory *Roe v. Wade* was for women. Some have said that "granting women a right to privacy in pregnancy matters was like granting women expensive, limited, and easily revocable guest privileges at the exclusive men's club called the Constitution. In contrast, men's membership in this club is a birthright, possibly retroactive to conception."[94] This criticism stems from the fact that the Court decided *Roe* on the basis of privacy and not equality.[95] That opinion seems very on point given the last presidential elections. With a candidate who is in favor of a woman's right to choose and another who was against abortion, women faced the possibility that *Roe v. Wade* could be overturned. The Constitution was written by men

[94] Twiss Butler, *Abortion Law: "Unique Problem for Women" or Sex Discrimination?*, 4 YALE J.L. & FEMINISM 133, 139 (1991).
[95] *Id.*

and signed by men. Women had very limited rights in society and were seen as attached to their husbands. It is not surprising that men where so successful at leading the anti-abortion campaign while women's opinions did not count for much. Many of the rights that women have now, did not exist when the Constitution was written. Although women do enjoy the right to vote now and can attend institutions of higher learning, their rights continue to remain fragile.

After *Roe v. Wade*, many attempts have been made to restrict the right to an abortion.[96] In *Harris v. McRae*,[97] The Supreme Court upheld the Hyde Amendment, which banned the use of federal Medicaid funds for abortion unless the mother's life would be endangered if she carried the pregnancy to term.[98] This case is criticized for restricting the ability of a woman to get an abortion through legislation.[99]

Despite the criticism that *Roe v. Wade* may face, it remains a victory for women's reproductive rights. Women came from a period where they controlled their reproductive choices to losing these choices and to gaining them again. While women were gaining and losing control over their reproductive rights, men who dominated the medical field gained the legitimacy of their profession. Currently, women are able to obtain abortions without the consent of men and men's reproductive freedoms are affected.

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[96] *See* Webster v. Reproductive Health Services, 492 US 490 (1989). The Court upheld a Missouri law that disallowed the use of public facilities for any abortion that was performed with the exception of those that were done to preserve the woman's life and required physicians to perform tests to determine the viability of fetuses after 20 weeks of gestation, and imposed other restrictions on abortion. The Court however declined to overrule *Roe*.
[97] 448 US 297 (1980).
[98] *Id*. at 327.
[99] Janessa L. Bernstein, *The Underground Railroad to Reproductive Freedom: Restrictive Abortion Laws and the Resulting Backlash*, 73 BROOK. L. REV. 1463 (2008).

Part IV – Men and Abortion

The Supreme Court has consistently declined to favor a man's reproductive rights over a woman's right to obtain an abortion. Despite the recognition of a man's right to procreate, the Court held that a state could not instruct a married woman to secure the consent of her husband prior to obtaining an abortion.[100] Therefore, a wife could abort a pregnancy without her husband's approval although the husband played a role in her pregnancy or may have wanted to father a child. In *Planned Parenthood v. Casey*[101] the Supreme Court restated the holding of *Roe v. Wade* that a woman had the right to obtain an abortion prior to the viability of the fetus without any restriction from the state.[102] Furthermore, the Court held that a "husband has no enforceable right to require a wife to advise him before she exercises her personal choices."[103] The Court took its holding in *Danforth* a step further by saying that the state could not require that the wife notifies her husband of her desire to obtain an abortion. The Court did not believe that a husband's interest in the life of his potential child outweighed that of the wife's interest in her bodily integrity.[104] The Court was concerned that the mere requirement of spousal notification would deter many wives from obtaining an abortion and could subject them to abuse from their husbands.[105] The Court believed that the husbands could even force the wives to not get an abortion until it is too late to do so.[106] By holding that a pregnant

[100] Planned Parenthood v. Danforth, 428 U.S. 52, 67-72 (1976).
[101] 505 U.S. 833 (1992). The Pennsylvania Abortion Control Act of 1982 required among other things that a wife notify her husband prior to obtaining an abortion. The Supreme Court affirmed the United States Court of Appeals for the Third Circuit's holding that such a requirement was unconstitutional.
[102] *Id.* at 870-71, 879.
[103] *Id.* at 898.
[104] *Id.*
[105] *Id.*
[106] *Id.*

woman does not have to secure the consent of the father before getting an abortion[107] or notify her husband[108], the Supreme Court has substantially limited the reproductive freedom of men and given more protection to women. Such disparity in the treatment of both sexes has led to the negligence of the affects of abortion on men.

The difficult decision to have an abortion does not only affect women. Men also are impacted by abortion. A man may feel like a woman holds his fate in her hands and can shape the rest of his life despite his objections.[109] If the man did not want to father a child but the woman opted to carry her pregnancy to term, the man will be have legal obligations towards a child that he did want in the first place.[110] On the other hand, if the man wanted to have a child and the woman does not want to, he loses the opportunity to become a father to the child that would have been born from that particular pregnancy. It is not surprising that many men do not get involved in the matter of abortion because they feel powerless in that area.[111] Arthur B. Shostak,[112] wrote of his experience with abortion when a former girlfriend of two years called him to tell him that she was pregnant and that "they" were getting an abortion.[113] Shostak related that he assumed the position of supportive partner.[114] Nevertheless, the situation and process was confusing for him and he needed support also.[115] In his article he urged feminists to put pressure the abortion

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[107] *See* Planned Parenthood v. Danforth, 428 U.S. 52 (1976).
[108] *See Casey*, 505 U.S. 833 (1992).
[109] Anna Mavroforou et. al., *Do Men Have Rights in Abortion? The Greek View.*, 29 MED. & L. 77, 78 (2010).
[110] Melanie B. Jacobs, *Intentional Parenthood's Influence: Rethinking Procreative Autonomy and Federal Paternity Establishment Policy*., 20 AM. U. J. GENDER SOC. POL'Y & L. 489, 498 (2012).
[111] *Id.*
[112] Dr. Arthur B. Shostak is an Emeritus Professor of Sociology in the Department of Culture and Communication at Drexel University, Philadelphia, P.A. 19104.
[113] Arthur B. Shostak, *I am NOT a "Rock": On Abortion and Waiting Room Men.*, http://www.menandabortion.com/art_personal.html#rock (last visited Dec. 12, 2012).
[114] *Id.*
[115] *Id.*

clinics to provide to men who sit in the waiting room similar counseling services to the ones that women who are seeking an abortion get.[116]

While men who are supportive of a woman who gets an abortion ask that they are given support also, men who did not agree to the abortion experience different emotions. These men may "feel anger, guilt, depression, helplessness and grief".[117] The guilt that men experience may come from the fact that they feel responsible for not wearing a condom and causing the pregnancy.[118] Men may also feel bad that they are not able to provide financially for the child.[119] In addition, men may be devastated if they actually wanted to have the child and the woman does not want to.[120] The pain is further intensified if the man wanted to have a child with that particular woman.[121] In addition, men are concerned with whether or not the woman will blame them for the situation.[122]

Although it is obvious that men are negatively impacted by abortion, the Supreme Court continues to dismiss or ignore these impacts in their decisions. Hence, situations where the woman could be in an abusive relationship and fears for her safety are used to support the woman's right to an abortion without the knowledge of the man. Nevertheless, the attitude of the Court towards men with regards to abortion does not change the fact that they are discriminated against based on their gender.

The decision of *Roe v. Wade* is criticized for being decided on the basis of the Due Process Clause of the Fourteenth Amendment rather then on the Equal Protection

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[116] *Id.*
[117] Mavroforou et al, *supra* note 109, at 82.
[118] *Especially for Men: Coping with a Pregnancy Decision*, http://www.menandabortion.com/formen.html (last visited Dec. 12, 2012).
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*

Clause.[123] The Due Process Clause of the 14th Amendment forbids any state from depriving a person of "life, liberty, or property without due process of the law"[124] while the equal protection clause is concerned that everyone is treated equally.[125] Since the Court opted to review the Texas' statute in *Roe* through the lens of Due Process, the Court did not have address the way in which abortion disrupts the reproductive freedom of men. The Court focused on the ways in which pregnancy affects women.[126] The fact that men do not get pregnant justified the Court's decision to not take into account the ways pregnancy may affect them. However, Lichtenberg and LeClair contended that some of the rationales that justified the holding in *Roe V. Wade*, such as unwed motherhood, are now out dated.[127] For example, the negative stigmas that were placed on women if they had a child out of wedlock are minimal nowadays. Consequently, women are less likely to seek an abortion because their pregnancy happened outside a marital relationship. Furthermore, they argued that the negative effects that an unwarranted pregnancy has on a woman could affect a man.[128] They listed certain examples of the man not being able to continue with his education or not being able to obtain his preferred employment[129] as justification that men and women can be similarly impacted by an unwanted pregnancy. Furthermore, they spoke of the societal expectation that the man will marry the pregnant woman.[130] In addition, the unwanted pregnancy will place

[123] Illya D. Lichtenberg & Jack Baldwin LeClair, *Advocating Equal Protection for Men in Reproductive Rights and Responsibilities*, 38 S.U. L. REV. 53 (2010).
[124] U.S. CONST. amend. XIV, § 1.
[125] *Id.*
[126] *See* Roe v. Wade, 410 U.S. 113, 153 (1973).
[127] Lichtenberg & LeClair, *supra* note 123, at 57.
[128] *Id.* at 59.
[129] *Id.* at 60.
[130] *Id.*

burdens of unexpected responsibilities on the man.[131] They even pointed out that men can lose friendships and be forced to obtain additional employment as a result of unexpected pregnancy.[132] In essence, they will face great financial burdens. Lichtenberg and LeClair provided evidence that men are more involved in child rearing than they were prior to *Roe v. Wade*.[133] Despite the fact that men share the same burden as women to care for a child once that child is born, men remain powerless regarding whether or not they wanted to father that child. In addition, child-support statutes that hinge the obligation to pay child support upon the biological relationship between a man and a child legitimize and foster this inequality.[134]

The unequal treatment that men suffer with regards to their reproductive freedom is not only confine to the lack of input they have when a woman wants to have an abortion. Men also have fewer options available to them when it comes to preventing a pregnancy.[135]Men only have three methods of preventing a pregnancy. They can have a vasectomy, use a condom or practice coitus interruptus, with is the withdrawal of the penis prior to ejaculation.[136] On the other hand, women have a lot more options to prevent a pregnancy. There are many different types of birth control methods available to women such as pills, injections, diaphragms, foam, spermicides and women could also monitor their menstrual cycles to avoid getting pregnant.[137] Once a man has engaged in the act of sexual intercourse with a woman, he is devoid of any decision-making powers after that act, should conception occur. However, it is not the same for women. A woman

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[131] *Id.*
[132] *Id.*
[133] *Id.* at 61.
[134] Erika M. Hiester, *Child Support Statutes and the Father's Right Not to Procreate*, 2 AVE MARIA L. REV. 213, 217 (2004).
[135] Lichtenberg & LeClair, *supra* note 123, at 69.
[136] *Id.*
[137] *Id.* at 70.

can take a "morning-after pill" in order to prevent a pregnancy if she thinks that there is a possibility that she could get pregnant.[138] The woman can even get an abortion during her first trimester of pregnancy without interference from anyone or the state.

Men are now starting to become vocal about the effects that a woman's free choice to have an abortion or not are having on their reproductive choices. Men are using the legal system to make their voices heard and to bring attention to the gender discrimination that they face. In *Dubay v. Wells*,[139] Dubay had an intimate sexual relationship with Wells when she became pregnant.[140] He in turn terminated the relationship and filed suit against Wells for bearing the child.[141] He also sought an injunction to prevent Wells from suing him for child support.[142]Dubay argued that the paternity statutes of the state of Michigan violated the Equal Protection Clause of the Fourteenth Amendment.[143] The District Court found that his contention was without merit because Michigan's law is not concern the right of a person to choose to be a parent but rather with the birth of the child; the law is gender neutral and requires that both parents support the child; and the fact that a woman unilaterally can choose to keep a pregnancy does not absolve a man of the duty to pay child support.[144] Furthermore, the court held that Dubay's responsibility to pay child support did not result from actions by the state.[145] Meaning that Dubay chose to engage in sexual intercourse with Wells and is responsible for the consequences of his actions. Dubay contends that he never wished to father the child and that Wells assured him that she was using some form of birth control

[138] *Id.*
[139] 442 F. Supp.2d 404 (2006).
[140] *Id.* at 405.
[141] *Id.*
[142] *Id.*
[143] *Id.* at 406.
[144] *Id.*
[145] *Id.*

and that she was infertile.[146] If what Dubay is saying is accurate and he truly did believe that Wells was infertile, is it fair that he fathers a child that he did not want to have and neither was he aware that he could have with this particular woman. It is not uncommon that women trick men into fatherhood.[147] Some men argue that they should not have to pay child support for a child that they truly did not wish to father and that they made their wish clear.

According to Sherry F. Colb[148], men are angry about the little control they have of their reproductive lives.[149] When a man has consensual sexual intercourse with a woman, he runs the risk of becoming a father although he does not want to.[150] He is forced to wait for the woman to decide whether she will continue the pregnancy. Some fathers' rights advocate have argued that if either a man or a woman wants to terminate a pregnancy, the pregnancy should be terminated despite the other partner's wish to have a child.[151] Based on that argument, a man could force a woman to get an abortion. It would be very dangerous for women if that argument were to succeed. Women would lose their autonomy and their bodies would be controlled by what a man wants. Another suggestion that is advanced by some men is that they should have the right to a "financial abortion" meaning that if the father oppose the birth of the child, the father should not have to pay child support.[152] Colb points out that while "financial abortion" is less apprehensive then that of a forced abortion, men as much as women have the ability to prevent a

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[146] *Id.*
[147] *See, e.g.*, Stephen K. v. Roni L., 105 Cal. App. 3d 640, (App. Ct. 1980); L. Pamela P. v. Frank S. (L. Pamela P. I), 449 N.E.2d 713, 714 (N.Y. 1983); Smith v. Price, 340 S.E.2d 408, 409-10 (N.C. 1986).
[148] Professor of Law at Cornell University and Charles Evans Hughes Scholar.
[149] Sherry F. Colb, *Should Men Have the Right to a "Financial Abortion"? A Biological Father Cries Sex Discrimination when Forced to Pay Child Support for an Unwanted Baby*, FINDLAW (Mar. 21, 2006), http://writ.news.findlaw.com/colb/20060321.html.
[150] *Id.*
[151] *Id.*
[152] *Id.*

pregnancy.[153] They have the choice to not have unprotected sex.[154] Consequently, the man cannot refuse responsibility for a child that helped father.

The argument that men should be able obtain a "financial abortion" is not completely without merit. When a woman gives her child up for adoption, she is no longer obligated to support that child financially and emotionally.[155] However for the man who wants nothing to do with the child is still obligated to pay child support.[156] Colb explained that this unequal treatment of men and women stems from the fact that women were seen as the nurturing parent while men were understood to be the providers.[157] The courts could not force a woman to care for a child that she did not want to care for.[158] However, it is more practical to require that the man supports the child financially.[159] Also, Colb noted that it is important that children do not become a burden on society and the people responsible for their birth should provide for them.[160]

Despite the burdens that an unwanted pregnancy places on men, many maintain that the current state of the law is fair and that the burdens on women outweigh those that men suffer. It is argued that pregnancy poses many risks that only burden women. Furthermore, not all pregnancies result from a stable relationship. Therefore if women were to obtain the consent of men prior to an abortion, we would revert to the time of clandestine abortions that cost the lives of so many women. Under current law, a woman who becomes pregnant with a man to whom she is not married is essentially on her own. Most states do require an unwed father to reimburse the mother of his child for certain

[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] *Id.*

birth and pregnancy-related medical expenses as part of his child support obligations or in connection with a paternity proceeding.[161] In addition it is argued that although men are profoundly disadvantaged by the reality that only women can produce a human being and experience the growth of a child in pregnancy. Pregnancy and childbirth are also burdensome to health, mobility, independence, and sometimes to life itself, and women are profoundly disadvantaged in that they alone bear these burdens.[162]

It is clear that the current state of the law discriminates against men when it comes to their reproductive freedom. Women are able to control whether or not men become fathers. Men do not have any legal recourse and are obligated to accept the action of women. While it is understandable that a woman's right over her body should not be taken from her, a man's reproductive freedom should also be respected.

Part V – Abortion, how can it work for both men and women?

If the law is to be truly committed to treating everyone equally, the laws with regards to abortion have to change. While keeping in mind that a woman's right to choose to have an abortion is very important, I would like to propose a narrow exception that will also take into consideration a man's right to reproduce. That except can be created from the claims for financial abortions that men have made. Perhaps a law should be drafted that would allow men obtain a court order that they may seek a financial abortion if the woman wants to carry to term a pregnancy when they did not wish to be fathers. Certainly there should be a hearing before the court that will put both parties on notice as to what would happen if they conceived a child. Furthermore, the man would

[161] Shari Motro, *The Price of Pleasure*, 104 NW. U. L. REV. 917, 918 (2010).
[162] *Id.* at 923.

have to take every step possible, such as using a condom, to prevent a pregnancy in order to enjoy the privileges of a financial abortion. Even though as a matter of public policy, a man cannot contract with a woman to not pay child support[163], the law should recognize that a narrow exception should be carved in order to not burden men who truly did not want to be fathers but whose decision making right was taken away from them. Scholars have pointed out that children whose fathers pay child support "tend to experience fewer behavioral and social problems and to perform better in school than children whose fathers do not".[164] Although it is important that children are cared for by their parents rather than by society, it is also important to respect the reproductive freedom of men. The financial abortion law would apply to men who, along with their partner, advise the court that they do not want to father a child. Furthermore, they would have to take all the necessary steps to prevent a pregnancy. It may be argued that proving that the man truly did all he could to prevent the pregnancy will be problematic. However, the justice system has dealt with cases in which there is a battle of "he said, she said", such as rape cases, and juries have been able to assign credibility.

It is a possibility that financial abortion will unduly burden a woman who may have to care for a child on her own. However, she will know ahead of time that she is involved with a man who does not want to be a father and what the consequences will be if she is pregnant. Furthermore, although society should not have carry the burden of caring for the child, the financial abortion exception would apply to a very narrow group of men. It would not apply to pregnancies that result as a matter of a one-night stand, or

[163] Jacobs, *supra* note 110, at 498. *See* Linda D. v. Fritz C., 687 P.2d 223 (Wash. Ct. App. 1984).
[164] Solangel Maldonado, *Beyond Economic Parenthood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 961 (2005) (citing Scott Altman, *A Theory of Child Support*, 17 INT'L J.L. POL'Y & FAM. 173, 190 (2003)).

the parties were in a relationship and the men decided that he does not want to father a child for a reason or another. Should this proposed financial abortion law be adopted, in the case of Dubai[165], his claim would have been valid if there was a court hearing during which he made it clear that he did not which to be a father and that he wore a condom during every act of sexual intercourse. The financial abortion law would therefore only protect him in the event that his contraceptive method fails.

Conclusion

The history of abortion in the United States from its practice to its criminalization and to its legalization is characterized by a gender wars and discrimination. Now we have reached an era where men are discriminated against because they do not carry children. Nevertheless, they participate in the process of pregnancy and do have an interest in the live of the unborn child. As history has shown in the past, it would be a great burden on women and society if the right to have an abortion were limited. The exception that I am proposing is very narrow and only takes into consideration the men who actually "apply" for a financial abortion prior to the conception of the child and have taken every step possible to prevent the pregnancy.

[165] Dubai v. Wells, 442 F. Supp.2d 404 (2006).